Supreme Court, U.S.
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No. 00 315

IN THE SUPREME COURT OF THE UNITED STATES

JOHN RATELLE, Warden, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners*,

v.

TONY PROTOPAPPAS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a state court's denial of a state habeas petition "on the merits and for lack of diligence" constitute a procedural bar within the meaning of Coleman v. Thompson, 501 U.S. 722, 730 (1991) to a consideration of the merits of the claims presented in a federal petition?

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Antiterrorism and Effective
Death Penalty Act 6

IN THE SUPREME COURT OF THE UNITED STATES

No.

JOHN RATELLE, Warden, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners*,

v.

TONY PROTOPAPPAS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

Petitioners (Respondents/Appellants), John Ratelle, Warden of a California prison and the Attorney General of the State of California, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, filed on June 12, 2000, appears at Appendix A to the Petition. The Order Adopting Report and Recommendation of United States Magistrate Judge, filed on June 20, 1996, appears at Appendix B, and the Report and Recommendation of United States Magistrate Judge on a Petition for Writ of Habeas Corpus by a Person in State Custody, dated April 10, 1996, appears at Appendix C.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On July 31, 1984, a jury convicted Tony Protopappas of three counts of second degree murder. After the California Court of Appeal affirmed Protopappas's convictions in People v. Protopappas, 201 Cal. App. 3d 152, 246 Cal. Rptr. 915 (1988),[1] the California Supreme Court denied his Petition for Review on July 20, 1988. On January 6, 1994, Protopappas filed his first state habeas petition, which the California Supreme Court denied. On December 22, 1994, Protopappas filed a second state habeas petition restating his previously denied claim and raised forty-seven new

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1. Protopappas, a dentist, murdered three women patients. He is serving three concurrent state prison terms of fifteen years to life with the possibility of parole.

claims. The California Supreme Court denied the second petition on May 24, 1995, in a single sentence order that stated: "Petition for writ of habeas corpus DENIED on the merits and for lack of diligence."

Protopappas filed a habeas petition in the United States District Court for the Central District of California. The district court denied the Petition, finding the California Supreme Court's decision for "lack of diligence" to have been based on an independent and adequate state ground. Protopappas appealed the district court's denial to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals reversed, finding the "lack of diligence" referred to California's untimeliness bar; and, the California Supreme Court's denials based on untimeliness lacked the requisite independent and adequate state ground to bar federal review because that court had failed to make clear that its denials based on untimeliness did not rest on questions of federal constitutional law. On July 18, 2000, the Court of Appeals granted a motion for an extended stay through and including August 28, 2000, if, within that time, a petition for a writ of certiorari is filed with the United States Supreme Court.

REASONS FOR GRANTING WRIT

Federal courts are barred from reviewing on habeas corpus a state prisoner's federal constitutional claims concerning the validity of a state criminal conviction if the prisoner has defaulted the claims in the state court under an independent and adequate state rule of procedure. Coleman v. Thompson, 501 U.S. 722, 750 (1991). A habeas petitioner who has failed to meet the State's procedural requirements for presenting federal constitutional claims has deprived the state courts of an opportunity to address those claims in the first instance.

Id. at 732. Federal habeas review of the claims is barred, but there are two explicit exceptions: first, when the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law; and, second, when the prisoner can demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice.

Federal-state comity -- the respect federal courts should have for the independence of state courts -- is the underpinning of the procedural default doctrine and its two important exceptions. The States' interest in finality of their criminal judgments is paramount and the procedural default doctrine accommodates that interest. Certiorari should be granted because the Ninth Circuit's decision cannot be reconciled with Coleman v. Thompson.

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH AN ESSENTIAL PART OF THIS COURT'S 1991 DECISION IN COLEMAN v. THOMPSON

This case, like Coleman v. Thompson, is about federalism and comity. Coleman, 501 U.S. at 726. It is also about finality. Protopappas murdered three women. He was tried and convicted, and has been in prison for the murders since 1984. He filed habeas petitions in the California courts ten years after the judgment was imposed, and five years after it became final. The California Supreme Court rejected the second such petition on the merits and "for lack of diligence" in a single sentence order. Adhering to Coleman v. Thompson, the district court refused to entertain on the merits forty-seven claims added to the second state habeas petition. The Ninth Circuit Court of Appeals reversed. It concluded that the California Supreme Court's one sentence order lacked the requisite independent and adequate state ground to bar federal review because that court had failed to make clear that its denials based on untimeliness did not rest on questions of federal constitutional law. The Ninth Circuit's decision is at odds with federalism and this Court's decision in Coleman v. Thompson.[2/]

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2. On April 17, 2000, this Court granted certiorari in a case that deals with the timeliness of the filing of a habeas petition in federal court. Bennett v. Artuz, 199 F.3d 116 (2d Cir. 1999), cert. granted, Artuz v. Bennett, 146 L. Ed. 2d 479 (2000). In Bennett v. Artuz this Court may address the meaning of the term "properly filed" for

California's untimeliness bar has been in effect for over half a century. Ex parte Swain, 34 Cal. 2d 300, 209 P.2d 793, 795 (Cal. 1949). The California Supreme Court has allowed exceptions -- constitutionally based -- for the litigation of untimely claims. In re Robbins, 18 Cal. 4th 770, 959 P.2d 311, 320 (Cal. 1998); In re Harris, 5 Cal. 4th 813, 855 P.2d 391, 395-398 (Cal. 1993); In re Clark, 5 Cal. 4th 750, 855 P.2d 729, 737-40 (Cal. 1993). The exceptions in noncapital cases are for prejudicial constitutional error, actual innocence, and the imposition of a conviction or sentence under an invalid statute. Clark, 855 P.2d at 734. None of the exceptions was expressly applied by the California Supreme Court when it rejected the claims Protopappas raised.

The decision of the Ninth Circuit cannot be reconciled with an essential part of this Court's decision in Coleman v. Thompson: the scope and application of the procedural default rule. The single sentence the California Supreme Court used when it denied the second habeas petition Protopappas filed -- "Petition for writ of habeas corpus DENIED on the merits and for lack of diligence" -- was clear and unambiguous. It was as clear as the three-sentence order at issue in Coleman v.

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purposes of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, P.L. 104-132, 110 Stat. 1214, amended 28 U.S.C. § 2254(d), in the context of untimely or successive state habeas petitions. The Circuits are divided on the meaning of the phrase "properly filed." Although Protopappas filed his federal habeas petition before the enactment of AEDPA, the principles of Coleman survive the enactment of AEDPA and play important roles in its interpretation. See Villegas v. Johnson, 184 F.3d 467 (5th Cir. 1999). Whether a claim or petition is subject to the procedural default rules plays into the interpretation of whether a state petition has been "properly filed" for purposes of tolling the one-year deadline for the filing of federal habeas petitions under AEDPA. See Dictado v. Ducharme, 189 F.3d 889 (9th Cir. 1999), criticized in Bennett v. Artuz, 199 F.3d 116.

Thompson that made no mention of federal law and was based on the Commonwealth's motion to dismiss for failure to meet time requirements.

As this Court indicated in Coleman v. Thompson, it has "no power to tell state courts how they must write their opinions." Coleman, 501 U.S. at 739. Rather, the application of the procedural bar rule should focus on the actual state court decision at issue and whether it fairly appears to rest primarily on federal law or to be interwoven with such law. The state court decision at issue in this case is the statement there was a "lack of diligence" in the presentation of the forty-seven claims in the second state petition. That statement is not intertwined or interwoven with federal law. As this Court explained, if the decision does not rest on federal law or is not interwoven with it, a federal court should not conduct a review on the merits of a claim the state court rejected on a procedural ground, unless one of two exceptions -- cause and prejudice or fundamental miscarriage of justice -- is established, because "it is primarily respect for the State's interests that underlies the application of the independent and adequate state ground doctrine in federal habeas." Coleman, 501 U.S. at 739. An inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own is not supportable in habeas jurisprudence. Id. at 751.

In Coleman this Court declined to expand the presumption of federal jurisdiction discussed in Harris v. Reed, 489 U.S. 255, 266 (1989) and Michigan v. Long, 463 U.S. 1032, 1038-1040 (1983), to those cases where the relevant state court decision does not fairly appear to rest primarily on federal law or to be interwoven with such law, noting there is "much that the States and state courts will lose." Coleman, 501 U.S. at 740. The conclusive presumption (of accepting federal jurisdiction) applies only where a state court decision fairly appears to rest

primarily on federal law and the adequacy and independence of any possible state law ground is not clear from the face of the state court opinion. Coleman, 501 U.S. at 733.

In effect the Ninth Circuit has done what this Court expressly refused to do and impliedly directed the lower federal courts to refrain from doing. Coleman, 501 U.S. at 733-740. The Ninth Circuit has presumed there was federal jurisdiction to review the forty-seven claims because of the asserted failure of the California Supreme Court to make it clear it was resting its decision on an independent and adequate state ground. There is a pattern in the Ninth Circuit of disregarding the actual state court decision and presuming there is federal jurisdiction. See e.g., La Crosse v. Kernan, 211 F.3d 468 (9th Cir. 2000); Park v. California, 202 F.3d 1146 (9th Cir. 2000), petition for cert. filed June 6, 2000; Washington v. Cambra, 208 F.3d 832, 833-34 (9th Cir. 2000), pet. for cert. filed July 3, 2000; Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000), (applied to untimeliness bar in capital case). The core reasoning of the cases is that California's exceptions to the untimeliness bar, which allow the California courts to entertain untimely claims on the merits, involve the application of federal constitutional law.

The reasoning is fundamentally flawed. Even though the California courts consider federal constitutional law in deciding whether to apply an exception to a time bar for constitutional error, that fact does not make the application of the timeliness bar itself an inadequate state law ground. It does not make all claims contained in a time-barred petition, where no exception has been raised or decided, susceptible to a merits review in the federal courts.

In Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994, and Jackson v. Calderon, 211 F.3d at 1153-54, the Ninth Circuit relied on Ford v. Georgia, 498 U.S. 411

(1991), for the proposition that in order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well established at the time of the petitioner's purported default. This Court's decision in Ford v. Georgia, a direct review case, predates by months the decision in Coleman. It dealt with the effect of Georgia's contemporaneous objection rule on the then-recent decision in Batson v. Kentucky, 476 U.S. 79 (1986). The Ninth Circuit should not be relying on this Court's "direct review" cases in determining whether a procedural bar is to be applied on habeas review. Not all federal constitutional claims can be litigated in the federal courts on habeas review because the important principle of "finality" limits the applications of "new rules" this Court announces. See Teague v. Lane, 489 U.S. 288 (1989) (plurality) (Batson claim barred on habeas review); Gilmore v. Taylor, 508 U.S. 333 (1993). Coleman, not Ford v. Georgia, is the key case in deciding whether a state court's decision rests on a procedural default that should be honored.

The flawed analysis is also demonstrated by the Ninth Circuit's decision in Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996), cert. denied, Calderon v. Morales, 519 U.S. 1001 (1996), where the court cited Hathorn v. Lovorn, 457 U.S. 255, 262-263 (1982) as a basis for its statement that a state cannot preclude federal review by invoking procedural rules that the state does not apply consistently. Morales, at 1390. Hathorn dealt with a Mississippi court decision involving the Voting Rights Act of 1965. Although Hathorn dealt with principles governing state court jurisdiction to decide federal issues, it had nothing to do with federal habeas jurisdiction over state court judgments in criminal cases. Likewise, the Ninth Circuit's reliance on this Court's principle that a state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed" was taken

from Hathorn and Hathorn's reliance on a civil rights era case involving direct review of a criminal conviction for breach of the peace (Barr v. City of Columbia, 378 U.S. 146 (1964). Id., at 1392. By relying on inapplicable cases that predate Coleman, the Ninth Circuit has imposed a novel requirement: a timeliness bar invoked by the California Supreme Court has to have been strictly or regularly followed. That is not the law in other circuits; nor is it one justified by this Court's decisions in habeas cases.

When the California Supreme Court in this case issued a decision with the words "lack of diligence" the statement was a clear invocation of an independent state ground. The statement was adequate to support the judgment. Coleman instructs that the federal courts are not allowed to review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. The statement -- the claims were being denied for "lack of diligence" -- was independent of any federal question and adequate to support the judgment; there was no ambiguity. In its refusal to accord due respect to the California Supreme Court's imposition of procedural bars such as lack of timeliness, important principles of finality, federalism and comity are being violated. State and federal resources are being wasted. The rules this Court made explicit in Coleman v. Thompson are being ignored in the Ninth Circuit. The federal courts are reviewing claims they should not be reviewing. As this Court explained in Coleman, a predicate to the application of the Harris presumption is that the state decision must fairly appear to rest primarily on federal law or to be interwoven with federal law. Coleman, 501 U.S. at 735. Nothing about the California Supreme Court's Protopappas decision in this case hints of federal law.

The Ninth Circuit has ordered the district court to conduct a merits review of the forty-seven claims Protopappas has raised without regard to whether Protopappas can make a showing that any of the forty-seven claims falls within one of the two explicit exceptions to the application of the procedural default rule. The exceptions are important. They can make a difference. They address the actual innocence of a prisoner or the fundamental fairness of the state proceedings leading to the prisoner's criminal judgment. A proper application of this Court's decision in Coleman v. Thompson should have resulted in a finding of procedural default because Protopappas clearly defaulted his federal claims in the California Supreme Court pursuant to an independent and adequate state procedural rule: lack of diligence.

In refusing to find a procedural bar, the Ninth Circuit short circuited its responsibilities. It should have decided whether Protopappas was able to demonstrate cause for the default and actual prejudice as a result of the alleged violations of federal law; or whether Protopappas was able to demonstrate that the failure to consider the claims on the merits would result in a fundamental miscarriage of justice.[3] Coleman, 501 U.S. at 750. The Ninth Circuit's failure to adhere to this Court's procedural default principles -- and its concomitant failure to apply the "cause and prejudice" and "fundamental miscarriage of justice" exceptions -- violates important principles of federalism and comity. Its practice inflicts a near fatal blow to the finality of many[4] criminal

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3. The parties briefed whether the two exceptions applied to any of the forty-seven claims.

4. The California Supreme Court noted it typically disposes of 1,500 noncapital habeas corpus petitions each year, most of which are disposed of on procedural grounds. Robbins, 18 Cal. 4th at 778, n. 1.

judgments and burdens the state and federal district courts with constitutionally unnecessary litigation.

In failing to find a procedural bar the Ninth Circuit has not drawn fair interferences from the California Supreme Court's decision in the Protopappas case. It is one thing to favor federal jurisdiction in ambiguous cases, it is quite another to favor it when the state court's decision is clearly one that rests on an adequate and independent state procedural ground such as lack of diligence. Federal jurisdiction should not exist over claims, like Protopappas's, when the presentation of them has been untimely and the state has not been persuaded to use an exception to the bar of untimeliness to consider the claims on the merits.

Instead of undertaking a merits review of every claim a state prisoner presents, a federal court must determine if the claim is a federal constitutional question, if the state's highest court was presented with it, and whether it was rejected because of a procedural bar. If the claim was rejected because of a procedural bar, the federal court must apply Coleman's explicit directions and determine if one of the two exceptions applies to allow for a merits' review. The process has been undermined in the Ninth Circuit.

The federal courts have the primary obligation to protect the federal constitutional rights of prisoners. Encumbering the duty with the unnecessary litigation of claims the states have rejected on state procedural grounds should not be countenanced. It has been nearly a decade since this Court decided Coleman. The concern that the federal courts would review claims of prisoners in custody pursuant to judgments resting on independent and adequate state grounds has been realized. See Coleman, 501 U.S. at 738. The wastefulness is enormous, especially since the finding of a procedural bar does not dispossess a federal court of jurisdiction; it triggers a duty to resolve whether there is an appropriate exception to the

application of the procedural bar -- for cause and prejudice or actual innocence -- exceptions that can mean freedom or a new trial for the prisoner.

Unlike other circuits, the Ninth Circuit is out of line with Coleman. See e.g., Lee v. Kemna, 213 F.3d 1037 (8th Cir. 2000); Miller v. Kemna, 207 F.3d 1096 (8th Cir. 2000); Wilson v. Moore, 178 F.3d 266, 276 (4th Cir. 1999), cert. denied Wilson v. Catoe, 145 L. Ed. 2d 160 (1999); Simpson v. Matesanz, 175 F.3d 200, 205 (1st Cir. 1999), cert. denied, 145 L. Ed. 2d 677 (2000); Tarver v. Hopper, 169 F.3d 710, 712 (11th Cir. 1999), cert. denied, Tarver v. Alabama, 145 L. Ed. 2d 1122 (2000); Mu'Min v. Pruett, 125 F.3d 192, 197 (4th Cir. 1997); see also Fairman v. Anderson, 188 F.3d 635 (5th Cir. 1999). Given scarce judicial resources, the Ninth Circuit's flawed approach results in far too great a burden on the state and federal courts within its jurisdiction. Id. at 739. Principles of finality, federalism and comity are being dealt heavy blows. Certiorari should be granted.

CONCLUSION

This case is about finality, federalism and comity, as well as the limited role the federal courts play in habeas litigation concerning the constitutional validity of criminal judgments arising out of state courts. Protopappas delayed the presentation of forty-seven habeas claims by more than ten years after he was convicted of three counts of murder in a California court. The California Supreme Court denied the forty-seven claims because of lack of diligence. The District Court followed the dictates of Coleman; the Ninth Circuit did not. This Court should grant certiorari because the Ninth Circuit's pattern of failing to apply Coleman in appropriate situations is out of line with the other federal circuit courts and wastes state and federal judicial resources.

Dated: August 23, 2000.

Respectfully submitted,

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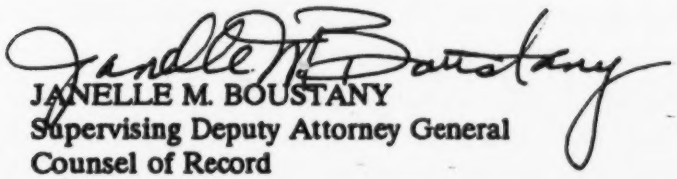

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

APPENDIX A

[Filed June 12, 2000]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY PROTOPAPPAS,	No. 96-55979
Petitioner-Appellant,	D.C. No. CV-95 04362-ABC
v.	
JOHN RATELLE, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,	MEMORANDUM[1]
Respondent-Appelles.	

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted April 6, 2000
Pasadena, California

Before: HUG, Chief Judge, THOMPSON, Circuit Judge, and RESTANI, Court of International Trade Judge[2]

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit Rule 36-3.

2. Honorable Jane A. Restani, Judge, United States Court of

Tony Protopappas appeals the district court's denial of his federal petition for writ of habeas corpus. Protopappas contends the district court erred in finding that the California Supreme Court's 1995 denial of his state habeas petition served as a procedural bar to federal habeas review. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we reverse and remand.

On July 31, 1984, a jury convicted Protopappas of second degree murder. After the California Court of Appeal affirmed Protopappas's conviction, the California Supreme Court denied his petition for review on July 20, 1988. On January 6, 1994, Protopappas filed his first state habeas petition, which the California Supreme Court denied. On December 22, 1994, Protopappas filed a second state habeas petition restating his previously denied claim as well as forty-seven new claims. The California Supreme Court denied the second petition on May 24, 1995 in a one sentence order: "Petition for writ or habeas corpus DENIED on the merits and for lack of diligence."

Protopappas then filed a federal habeas petition, which included all forty-eight claims, in the United States District Court for the Central District of California. The district court denied the petition, finding the California Supreme Court's denial to be based on independent and adequate state grounds. Protopappas appeals the district court's denial of his forty-seven new claims but does not appeal the denial of his original claim included in his first state habeas petition.

We review de novo the district court's denial of a petition for writ of habeas corpus based on the ground of state procedural default. See Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000). Federal courts may not "review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate

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International Trade, sitting by designation.

to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991). "In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994).

The California Supreme Court's citation of "lack of diligence" refers to the untimeliness bar because of Protopappas's delay of approximately five years between his direct appeal and his state habeas corpus petition. See In re Robbins, 959 P.2d 311, 340, n. 34 (Cal.1998). In a recently decided case, La Crosse v. Kernan, No. 97-55085, 2000 WL 432414, at *1 (9th Cir. Apr. 24, 2000), we addressed an identically worded California Supreme Court habeas denial and concluded that, as of April 1996, the California Supreme Court had failed to make clear that its denials based on untimeliness did not rest on questions of federal constitutional law. See id. at *4. The California Supreme Court's 1995 denial of Protopappas's petition, therefore lacks the requisite independent and adequate state ground to bar federal review. See id.

We therefore reverse the district court's denial of Protopappas's habeas petition and remand to the district court for further proceedings.

REVERSED and REMANDED.

APPENDIX B

[Filed June 20, 1996]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TONY PROTOPAPPAS, Petitioner, v. JOHN M. RATELLE, Warden, et al., Respondents.	Civil No. CV 95-4362-ABC (Mc) ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636(b)(1)(B), the court has reviewed the pleadings and other papers herein, the Report and Recommendation of the United States Magistrate Judge, and the objections thereto, and approves and adopts the Magistrate Judge's findings, conclusions and recommendations. The court has made a de novo determination of those portions of the report to which objection has been made.

IT IS ORDERED that the Clerk shall serve copies of this Order and the Judgment by United States Mail on the petitioner and the Attorney General for the State of California.

Dated: June 14, 1996

AUDREY B. COLLINS
United States District Judge

APPENDIX C

APPENDIX C

[Filed April 10, 1996]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

TONY PROTOPAPPAS,	) Civil No.
	) CV 95-4362-ABC (Mc)
Petitioner,	)
	) REPORT AND
v.	) RECOMMENDATION
	) OF UNITED STATES
JOHN M. RATELLE,	) MAGISTRATE JUDGE
Warden, et al.,	) ON A PETITION
	) FOR WRIT OF HABEAS
Respondents.	) CORPUS BY A PERSON
	) IN STATE CUSTODY

This Report and Recommendation is submitted to the Honorable Audrey B. Collins, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

The petitioner is a state prisoner in the R.J. Donovan Correctional Facility in San Diego, California. Following a jury trial in the Orange County Superior Court, the Petitioner was convicted of three counts of second degree murder on July 31, 1984. (Petition, p. 3; Answer, p. 2). On October 22, 1984, the petitioner was sentenced to three concurrent terms of 15 years to life in the state prison.

The Court of Appeal affirmed the petitioner's conviction on May 13, 1988. (Lodgment Item #5.). The petitioner alleges that he filed a petition for review in the California Supreme Court which the California Supreme Court denied on July 20, 1988. (First Amended Petition, p. 3). On January 6, 1994, the petitioner filed a petition for writ of habeas corpus with the California Supreme Court in which he claimed that he was denied the effective assistance of counsel because both his trial counsel and appellate counsel failed to challenge the constitutionality of California's reasonable doubt jury instruction, CALJIC No. 2.90. (Lodgment Item #1, p. 4). The California Supreme Court denied that petition on January 26, 1994. On December 22, 1994, the petitioner filed a seeond habeas petition in the California Supreme Court, raising 48 claims, including the ineffective assistance of counsel claim raised in the first state habeas petition. (Lodgment Item #3). On May 24, 1995, the California Supreme Court denied that second habeas petition "on the merits and for lack of diligence." (Lodgment Item #4).

The petitioner filed the present petition for federal habeas relief in this court on June 30, 1995. The petitioner filed a First Amended Petition for Writ of Habeas Corpus on August 2, 1995, raising 48 individual claims alleging the following constitutional violations: (1) the petitioner was denied the effective assistance of trial counsel in violation of the Sixth Amendment (First Amended Petition, pp. 12-57); (2) the petitioner was denied the effective assistance of appellate counsel in violation of the Sixth Amendment (First Amended Petition, pp. 57-76); (3) the petitioner was denied a fair and impartial trial because of the trial court's abuse of discretion, misconduct, bias and prejudice (First Amended Petition, pp. 76-92); (4) the petitioner was denied equal protection and due process because of the prosecutor's invidiously discriminatory prosecution (First Amended Petition, pp. 92-95); and (5) the petitioner was denied a fair and impartial trial because of prosecutorial

misconduct during closing arguments (First Amended Petition, pp. 97-112). On October 16, 1995, the respondent filed an answer to the petitioner's first amended petition. The petitioner filed a traverse on November 21, 1995.

DISCUSSION

A. Procedural Default

In a federal habeas petition, the federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 2553-54, 115 L.Ed.2d 640 (1991); Harris v. Reed, 489 U.S. 255, 260, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). The independent and adequate state ground doctrine has been routinely applied to bar federal habeas relief when a state court declines to address a state prisoner's federal claims on the ground that the prisoner had failed to comply with a state procedural requirement. In such cases, the state judgment rests upon an independent and adequate state procedural ground. Coleman v. Thompson, 501 U.S. at 729-30. A petitioner, however, may overcome the procedural bar if he "can demonstrate cause for the procedural default and actual prejudice, or demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice." Noltie v. Peterson, 9 F.3d 802, 805 (9th Cir. 1993) (citing Coleman v. Thompson, 501 U.S. at 749-50).

"[I]f a state court clearly and expressly states that consideration of a federal constitutional claim is barred because of an adequate and independent state law ground, federal review is foreclosed notwithstanding the fact that relief was denied on merits in an alternative holding." Anselmo v. Sumner, 882 F.2d 431, 433 (9th Cir. 1989) (citing Harris v. Reed, 489 U.S. at 204, n. 10; but see

Siripongs v. Calderon, 35 F.3d 1308, 1317-18 (9th Cir. 1994), cert. denied, __U.S._, 115 S.Ct. 1175, 130 L.Ed.2d 1127 (1995).

Before filing the present petition, the petitioner filed a petition for review and two petitions for writ of habeas corpus with the California Supreme Court. The petitioner filed his first state habeas petition in the California Supreme Court on January 6, 1994, almost ten years after his conviction. The first state habeas petition claimed that the petitioner was denied the effective assistance of counsel because both his trial counsel and appellate counsel failed to challenge the constitutionality of CALJIC 2.90. (Lodgment Item #1, pp. 2, 4). The California Supreme Court denied that petition on the merits. Harris v. Superior Court, 500 F.2d 1124, 1128 (9th Cir. 1974), cert. denied, 420 U.S. 973, 95 S.Ct. 1394, 43 L.Ed.2d 652 (1975).

On December 22, 1994, the petitioner filed his second state habeas petition raising the same 48 claims he is now attempting to raise in the present petition. The California Supreme Court denied the petitioner's second state habeas petition "on the merits and for lack of diligence." (Lodgment Item #3). By this phrase, the California Supreme Court clearly and expressly stated that, in addition to denying the petition on the merits, it was denying the petitioner's second state habeas petition on procedural grounds, i.e., for lack of diligence. The California Supreme Court clearly identified the single basis of its procedural bar - lack of diligence. Thus, this case is not one in which the federal court must speculate regarding the basis of the procedural bar asserted by the California Supreme Court. See Siripongs v. Calderon, 35 F.3d at 1317.

It appears that the California Supreme Court's denial of the second state habeas petition on procedural grounds only affects 47 of the 48 claims raised in that petition. By its ruling on the petitioner's first habeas petition, the California Supreme Court had already denied the petitioner's claim that he was deprived of the effective

assistance of counsel because both trial counsel and appellate counsel's failed to challenge CALJIC 2.90. It is thus improbable that the California Supreme Court denied that claim on a procedural ground when the petitioner re-asserted that claim in his second state habeas petition.

This court therefore must determine whether the California Supreme Court denied 47 of the 48 claims raised in the second state habeas petition on an independent and adequate state procedural ground. States are free to construct rules governing the timeliness of raising constitutional claims. Williams v. Georgia, 349 U.S. 375, 382-83, 75 S.Ct. 814, 99 L.Ed.2d 1161 (1955); Ford v. Georgia, 498 U.S. 411, 423, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991); Deere v. Calderon, 890 F.Supp. 893, 897 (C.D. Cal. 1995). California has longstanding rules regulating the availability of state habeas relief for state criminal defendants. Deere v. Calderon, 890 F.Supp. at 897. The California Supreme Court has consistently required that, in habeas corpus proceedings, a petitioner must justify any substantial delay in seeking relief. In re Clark, 5 Cal.4th 750, 765, 783, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993); In re Swain, 34 Cal.2d 300, 302, 209 P.2d 793 (1949); cert. denied, 338 U.S. 944, 70 S.Ct. 425, 94 L.Ed.2d 582 (1950); In re Stankewitz, 40 Cal.3d 391, 396 n. 1, 220 Cal.Rptr. 382, 708 P.2d 1260 (1985). By expressly denying the petitioner's second state habeas petition "for lack of diligence," in addition to denying it on the merits, the California Supreme Court denied the petition on an independent and adequate state procedural rule. Coleman v. Thompson, 501 U.S. at 729-30; Anselmo v. Sumner, 882 F.2d at 433.

The California Supreme Court clearly and expressly denied the petitioner's second state habeas petition on an independent and adequate state procedural ground. This court is foreclosed from reviewing 47 of the petitioner's 48 claims, unless the petitioner can establish cause for the procedural default and the actual prejudice, or can demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice.

Anselmo v. Sumner, 882 F.2d at 433; Noltié v. Peterson, 9 F.3d at 805.

Here, the petitioner argues that the delay in raising his 48 claims was caused by the following: (1) there was a conflict between his work hours and library hours; (2) it took approximately one year before the petitioner received the trial record; and (3) the petitioner was not knowledgeable enough to recognize the existence of facts supporting many meritorious claims. (Traverse, pp. 12-16). These reasons manifestly do not demonstrate adequate cause for the delay of more than 10 years after the conviction before first presenting the 47 claims to the California Supreme Court. Even assuming that these reasons are adequate to establish cause, the petitioner has failed to establish actual prejudice. Noltie v. Peterson, 9 F.3d at 805. Moreover, the petitioner has not demonstrated that the failure to consider the claims will result in a fundamental miscarriage of justice. Id. Based on the foregoing, it appears that 47 of the petitioner's 48 claims are procedurally barred from federal habeas review.

B. Ineffective Assistance of Counsel

The petitioner claims that he was denied the effective assistance of counsel because both trial counsel and appellate counsel failed to challenge the constitutionality of CALJIC 2.90, the California reasonable doubt instruction. Specifically, he argues that CALJIC 2.90 reduced the standard of proof from evidentiary or factual certainty to moral certainty which is a quantum less than that required by the Constitution. The petitioner's claim is without merit.

To show ineffective assistance of counsel, the petitioner must demonstrate that his counsel's performance was deficient, and that the deficient performance prejudiced his defense. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993), Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984). The standard for assessing the performance of appellate and trial counsel is the same. Alford v. Rolfs, 867 F.2d 1216, 1220 (9th Cir. 1989).

This court must determine whether the petitioner's trial counsel's and appellate counsel's failure to challenge CALJIC 2.90 amounted to deficient performance. The failure to make a futile motion or argument does not constitute ineffective assistance of counsel. James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994), cert. denied, __U.S.__, 115 S.Ct. 333, 130 L.Ed.2d 291 (1994); United States v. Zazzara, 626 F.2d 135, 138 (9th Cir. 1980).

In a criminal case, the government must prove every element of a charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The United States Supreme Court has directly held that CALJIC 2.90, the standard California reasonable doubt instruction, correctly conveys the concept of reasonable doubt, and that there is no reasonable likelihood that the jurors would understand that instruction to allow a conviction based on proof insufficient to meet the Winship standard. Victor v. Nebraska, __U.S.__, 114 S.Ct. 1239, 1241, 1243, 1247-8, 1250; 127 L.Ed.2d 583 (1994). In effect, the holding in Victor v. Nebraska is that the use of CALJIC 2.90 does not constitute a constitutional violation. It would have been an exercise in futility for either trial counsel or appellate counsel to challenge the constitutionality of CALJIC 2.90. Therefore trial counsel's and appellate counsel's failure to challenge CALJIC 2.90 did not constitute ineffective assistance of counsel. James v. Borg, 24 F.3d at 27.

RECOMMENDATION

The magistrate judge therefore recommends that the court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that

judgment be entered denying the petition on the merits as to all claims.

Dated: April 10, 1996

JAMES W. McMAHON
United States Magistrate Judge